Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

GRIFFIN INDUSTRIES, INC.,

Petitioner,

v.

TOMMY IRVIN, in his official capacity as Commissioner of the Georgia Department of Agriculture and in his individual capacity, LEE MYERS, in her official capacity as Assistant Commissioner of the Georgia Department of Agriculture and in her individual capacity, GEORGE GORNTO, JOSHUA E. KIGHT, DUBOSE PORTER, and HAROLD REHEIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case decided on a motion to dismiss, the Eleventh Circuit imposed a heightened pleading standard on the plaintiff in a "class of one" equal protection claim. This virtually insurmountable standard was applied based upon the conclusion that the allegedly unconstitutional conduct involved "multi-dimensional decisions," a conclusion derived from selective portions of documents attached to the complaint. The Eleventh Circuit further held that only factually similar authority may provide fair warning of a constitutional violation for purposes of qualified immunity. The questions presented are:

I. Whether a federal court should apply a heightened pleading standard more stringent than the pleadings requirements of Rule 8(a) of the Federal Rules of Civil Procedure in a "class of one" equal protection claim under 42 U.S.C. § 1983 based upon a factual finding derived from documents attached to the complaint that the decision in question was "multi-dimensional."

II. Whether "fair warning" of a constitutional violation in a "class of one" equal protection claim can be established only by prior cases with "materially similar" facts for purposes of qualified immunity.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Griffin Industries, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Petitioner Griffin Industries, Inc. respectfully seeks a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The order of the United States District Court for the Northern District of Georgia in which it denied qualified immunity to Respondents George Gornto, Joshua Kight, Tommy Irvin, Lee Myers, Harold Reheis & Dubose Porter (collectively "Respondents"), is unreported, but may be found at 2006 WL 783354 (N.D. Ga. Mar. 23, 2006), and is reproduced in the Appendix to this Petition ("App.") at 43a-89a. The initial decision of the Eleventh Circuit is reported at 496 F.3d 1189 (11th Cir. 2007), and is reproduced at App. 1a-42a. The Eleventh Circuit denied panel rehearing and rehearing *en banc* in an order that is reported in table format at __ F.3d __ (11th Cir. Nov. 13, 2007) (Table No. 06-12370AA) and is reproduced at App. 90a.

JURISDICTION

The Eleventh Circuit Court of Appeals entered judgment on August 21, 2007. The Court of Appeals denied panel rehearing and rehearing *en banc* on November 13, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution, U.S. Const. Amend. XIV and 42 U.S.C. § 1983 are reproduced at App. 92a.

STATEMENT OF THE CASE

A. Introduction

This case presents a scenario of vital importance to all citizens and entities subject to governmental regulation. In direct conflict with this Court's precedent, the Eleventh Circuit's opinion blocks virtually all "class of one" equal protection claims within the Eleventh Circuit by requiring a plaintiff to establish the elements of its case prior to obtaining any discovery. With no means of vindication, individuals and entities are essentially stripped of their constitutional rights, at the will and mercy of government acting free of legal consequence. This utter decimation of "class of one" equal protection claims is in direct conflict with this Court's opinion in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), and with the case law from other circuits in which courts have recognized that there is no heightened pleading standard in such cases.

Likewise, the requirement that a plaintiff must present factually identical authority to establish "fair warning" of a constitutional violation renders the possibility of piercing the shield of qualified immunity virtually impossible. The requirement of showing factually similar authority to establish "fair warning" for purposes of qualified immunity is in direct conflict with this Court's opinion in *Hope v. Pelzer*, 536 U.S. 730 (2002). These direct conflicts should be addressed by this Court.

B. Constitutional Background

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). It is not necessary for a plaintiff asserting a violation of its equal protection rights to allege that it is a member of a protected class. A plaintiff may successfully bring a "class of one" equal protection claim where the plaintiff alleges that it has been "intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. at 564 (citing *Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. 441, 445 (1923); *Alleghany Pittsburgh Coal Co. v. Comm'n of Webster County*, 488 U.S. 336 (1989)).

In order to overcome a defendant's claim of qualified immunity against a claim for violation of equal protection rights, a plaintiff must first show that a governmental actor violated a constitutional right. *Hope*, 536 U.S. at 736. If a constitutional right has been violated, "the next, sequential step is to ask whether the right was clearly established." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If the plaintiff demonstrates that the actor violated a clearly established constitutional right, then qualified immunity from suit does not apply. *Hope*, 536 U.S. at 745.

C. Factual Background

Griffin Industries, Inc. ("Griffin") filed this action on March 11, 2005, asserting claims under 42 U.S.C. § 1983 for violation of its rights to equal protection and due process of law and for conspiracy to violate those constitutional rights.

Griffin is engaged in the business of rendering. Rendering is the process of recycling the inedible parts of slaughtered animals, such as fat, bone and offal, into useful products, such as livestock and poultry feed. Griffin operates two (2) poultry rendering facilities in the State of Georgia, comprising approximately five (5) percent of the state's poultry rendering market. Griffin's primary competitor in Georgia is American Proteins, Inc. ("American Proteins"), which operates three (3) poultry rendering facilities in the State of Georgia. American Proteins' rendering facilities comprise approximately eighty-five (85) to ninety (90) percent of Georgia's poultry rendering market.

Griffin has owned and operated a rendering facility in Laurens County, Georgia, adjacent to the city of East Dublin, Georgia ("the Dublin Facility") since 1981. At the time Griffin purchased and began to operate the Dublin Facility, the area surrounding the plant was rural with few, if any, residences. In the late 1990s, developers, including Respondent George Gornto and business associates of Respondent Dubose Porter, purchased land and erected residential developments near the Dublin Facility. Respondents Gornto and Porter were both prominent political figures in the East Dublin area. At the same time, and at the apparent prompting of

Respondents Gornto and Porter, as well as Defendants the City of East Dublin and Laurens County, the Dublin Facility began to receive an increased number of complaints from surrounding residents regarding odor.[1] This also coincided with Griffin's procurement of additional contracts with significant poultry producers in the State of Georgia.

In its complaint, Griffin alleges that certain state and city governmental officials conspired to harm Griffin's business and shut down the Dublin Facility by subjecting it to disparate and arbitrary environmental and administrative regulation and permitting practices without rational basis. The complaint alleges that Respondents violated, and conspired to violate, Griffin's rights to equal protection and due process of law by undertaking a series of unlawful acts, including: (1) targeted harassment of Griffin; (2) subjecting Griffin to regulatory requirements not required of similarly situated rendering facilities with respect to conditions imposed in Griffin's Clean Air Act Title V Air Permit ("Title V Permit"); and (3) suspending Griffin's Land Application System Permit ("LAS Permit") without notice or hearing, by use of a meritless "Emergency Order."

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1. Additional defendants were named in Griffin's complaint, including Carol Couch, in her official capacity as Director of the Georgia Environmental Protection Division of Georgia, the City of East Dublin, Georgia and Laurens County, Georgia. Claims against these additional defendants were not the subject of the appeal considered by the Eleventh Circuit.

The emergency suspension of the LAS Permit was allegedly based on an isolated test of an on-site well which purported to show nitrate levels in excess of those allowed by law. The emergency suspension of the LAS Permit resulted in a partial shutdown of the Dublin Facility, causing damages to Griffin in excess of Four Hundred Thousand Dollars ($400,000.00). The same standard for the maximum acceptable level of nitrates in wastewater applies uniformly to all rendering companies with LAS Permits. However, Respondents did not seek an emergency suspension of the LAS Permit of American Proteins' plant, despite the fact that tests of the ground water surrounding that facility far exceeded both legal limits and the readings found at Griffin's Dublin Facility. With respect to the emergency suspension, an Administrative Law Judge ("the ALJ") subsequently ruled that: (1) there was no basis for the suspension; and (2) the Environmental Protection Division for the State of Georgia ("EPD") had not imposed similar penalties on similarly situated rendering plants.

Griffin alleged that Respondents subjected it to undue and improper regulatory requirements by imposing arbitrary and capricious requirements and sanctions upon its Dublin Facility without rational basis. Griffin alleged that it had been singled out by Respondents and that other similarly situated rendering facilities operating in Georgia, including its chief competitor, American Proteins, had not been subjected to similar treatment despite the fact that environmental conditions at their facilities were far worse than those at the Griffin facility.

D. The District Court Opinion

The district court granted in part and denied in part the Respondents' various motions to dismiss, for judgment on the pleadings and/or for transfer. *Griffin Indus., Inc. v. Couch*, 2006 WL 783354 (N.D. Ga. Mar. 23, 2006). The district court's opinion is set out in full at App. 43a-89a.

Of primary importance to this petition, the trial court denied the individual Respondents' claims of qualified immunity, holding that Griffin had asserted a valid "class of one" equal protection claim and that Respondents had fair warning that their acts were unconstitutional for purposes of denying qualified immunity. The district court accepted the allegations of Griffin's complaint as true for purposes of the Respondents' 12(b)(6) motions to dismiss. Citing this Court's opinion in *Village of Willowbrook v. Olech*, the trial court held that Griffin had sufficiently alleged that it had been singled out and treated disparately than other similarly situated rendering facilities in Georgia, including its primary competitor, American Proteins. The district court further held that this Court's opinion in *Olech* and the Eleventh Circuit's opinion in *Executive 100, Inc. v. Martin Co.*, 922 F.2d 1536 (11th Cir. 1991), *cert. denied*, 502 U.S. 810 (1991), both of which concerned equal protection violations, provided Respondents with "fair warning" that the conduct alleged by Griffin was unlawful. Thus, the district court denied the Respondents' claim of qualified immunity.

E. The Panel Opinion

The Eleventh Circuit Panel ("the Panel") reversed in part the district court's order and remanded for further proceedings. *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189 (11th Cir. 2007), App. 1a-42a.

The Panel held that Griffin failed to state a "class of one" equal protection claim based on the Panel's determination that Griffin failed to establish that it was "similarly situated to its competitor, American Proteins." Specifically, the Panel held that statements in the ALJ order attached to the complaint established that American Proteins was not similarly situated to Griffin pursuant to a novel and rigorous test applied by the Panel because it urged that this case involved "multi-dimensional decisions." The Panel also held that Griffin had failed to show that the Respondents' actions lacked a rational basis based upon its determination that the exhibits to the complaint "suggest" a possible rational basis for Respondents' actions.

The Panel further held that Griffin had not established that Respondents had "fair warning" that their actions were unconstitutional because Griffin had not provided precedent to show a violation of clearly established law that involved a similar factual situation.

Based upon its determination that the allegedly unconstitutional decision was "multi-dimensional," the Panel did not accept the allegations of Griffin's complaint as true for purposes of the Respondents' motions to dismiss, but instead held Griffin to the higher standard of having to prove the elements of its claims and simultaneously refute any potential defenses against those claims – all without the benefit of any discovery.

REASONS FOR GRANTING THE PETITION

Griffin's petition provides this Court with an opportunity to preserve the rights of individuals and entities to pursue "class of one" equal protection claims in keeping with the holdings and principles enunciated by this Court. The lower courts have wrestled with this Court's opinion in *Village of Willowbrook v. Olech* since it was issued in 2000, with 3,989 opinions citing this three (3) page decision.[2] The Panel's decision, in which it adopted a novel test for analyzing and deciding "class of one" equal protection claims under 42 U.S.C. § 1983 at the motion to dismiss stage, personifies the confusion that characterizes the post-*Olech* landscape. The Panel's decision radically departs from Supreme Court precedent, as well as the case law of other circuits and the Eleventh Circuit itself, by imposing a heightened pleading standard for "class of one" claims under certain circumstances. The Panel's decision virtually extinguishes all "class of one" cases in the Eleventh Circuit and creates an opportunity for other circuits to block such claims elsewhere. Review should be granted to correct this grave consequence. This case presents this Court with an opportunity to revisit the *Olech* decision, preserve its integrity and define the contours of the "class of one" equal protection claim.

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2. *See, e.g., Jennings v. City of Stillwater*, 383 F.3d 1199, 1210-11 (10th Cir. 2004) (noting that "[i]n the wake of *Olech*, the lower courts have struggled to define the contours of class-of-one cases," and that commentators have similarly struggled to define the parameters of *Olech*) (internal citations omitted).

This petition also presents the important question of whether a plaintiff must present factually similar authority in order to demonstrate that a constitutional right was clearly established sufficient to strip governmental actors of immunity. Griffin submits that the Eleventh Circuit's opinion directly conflicts with this Court's decision in *Hope v. Pelzer*, in which this Court rejected prior case law holding that before a precedent could give a defendant "fair warning," such precedent had to have "materially similar" facts to the decision at issue.

I. THE PANEL'S STANDARD FOR CONSIDERING "CLASS OF ONE" EQUAL PROTECTION CLAIMS CONFLICTS WITH THE DECISIONS OF THIS COURT AND DECISIONS OF THE ELEVENTH CIRCUIT.

The Panel's novel "multi-dimensional decisions" standard for addressing "class of one" equal protection cases directly conflicts with decisions of this Court, the Eleventh Circuit and other circuits. The Panel decision essentially writes *Olech* out of the law by ending virtually all plaintiffs' ability to pursue "class of one" cases in the Eleventh Circuit. The novel approach marks a radical departure from the pleadings standard set forth by this Court and the Eleventh Circuit and sets a dangerous precedent. This Court should grant certiorari in order to address this important conflict.

A. In *Olech*, This Court Did Not Hold That Analysis Of The Nature Of The Governmental Decision In A "Class Of One" Equal Protection Claim Was Appropriate In Adjudicating A Motion To Dismiss.

This Court held in *Olech* that a plaintiff states a claim for a constitutional violation for a "class of one" where she alleges that she has been treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000). The Court's opinion in *Olech* does not contain any analysis of the nature of the governmental decision that was being made in that case or the factors that were being considered by the government actor.

The plaintiff in *Olech* stated a claim by alleging in her amended complaint that the defendant demanded a larger easement from her than it did from "similarly situated property owners" and that the demand "was 'irrational and wholly arbitrary.'" *Id.* The plaintiff's amended complaint in that case alleged that the defendant Village of Willowbrook demanded a 33-foot easement as a condition to connecting her property to the municipal water supply when the Village had demanded only a 15-foot easement from other similarly situated property owners. *Id.* at 565. The plaintiff's amended complaint further alleged that the Village's demand was irrational and wholly arbitrary. *Id.*

The defendant Village argued that the plaintiff failed to state a claim because certain allegations in the plaintiff's amended complaint demonstrated a rational

basis for the demand for a larger easement in conjunction with connecting the plaintiff's residence to the municipal water supply. Specifically, the amended complaint alleged that the purported reason for the larger easement was that it was necessary in connection with proposed improvement of the infrastructure of the road. *See* Petition for Writ of Certiorari To the United States Court of Appeals for the Seventh Circuit filed by Petitioner Village of Willowbrook, 1999 WL 33609285, at *18 (Feb. 10, 1999).

This Court accepted as true for the purpose of the motion to dismiss Olech's allegations that there were similarly situated property owners and that there was no rational basis for the Village's disparate demand upon her. This Court did not address the factors that would be considered by the Village in making the decision regarding the necessary size of the easement. Although the plaintiff had pled in her complaint the Village's purported rational basis for drawing a distinction between her and other property owners, this Court refused to conduct a fact-finding inquiry at the motion to dismiss stage to determine whether the plaintiff was *actually* similarly situated or whether there was *actually* a rational basis for the decision in question. It was sufficient that plaintiff had pled both of these elements.

In the case before this Court, the Panel summarily decided that the decision at issue in *Olech* was "one-dimensional" because the only issue was the size of the easement necessary to connect to the water supply. However, Olech's own amended complaint demonstrated that at least one potentially differentiating factor – specifically the need for more space to improve

infrastructure – was purportedly being considered as part of the decision on the size of the easement necessary to connect to the water supply. The Panel ignored the plain language in *Olech* and instead applied a heightened pleading standard based on its determination that the alleged unconstitutional decisions at issue were "multi-dimensional" in nature. Griffin submits, however, that the application of the "multi-dimensional" analysis is a red herring. The Panel's new standard is simply another way to employ the summary judgment standard at the motion to dismiss stage, and it is therefore contrary to this Court's ruling in *Olech*.

B. There Is No Precedent For The Novel Application At The Motion To Dismiss Stage Of A Heightened Pleading Standard For "Multi-Dimensional" Governmental Decisions.

The Panel cited no authority to support its position that it is acceptable to consider the various factors that might go into a governmental decision at the motion to dismiss stage. Instead, the only authorities cited by the Panel as precedent for this new approach were cases addressing summary judgment or post-trial issues. In these summary judgment and post-trial cases, the facts had been sufficiently developed to determine whether parties were similarly situated or whether government actors had acted without rational basis. *See Campbell v. Rainbow City*, 434 F.3d 1306, 1314 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 559 (2006) ("similarly situated" analysis conducted post-jury verdict); *Knight v. Baptist Hosp. of Miami, Inc.*, 330 F.3d 1313, 1316-19 (11th Cir. 2003) (summary judgment); *Purze v. Village of Winthrop Harbor*, 286 F.3d 452 (7th Cir. 2002) (summary

judgment); *McDonald v. Village of Winnetka*, 371 F.3d 992, 1002 (7th Cir. 2004) (summary judgment); *Hicks v. Jackson County Comm'n*, 374 F. Supp. 2d 1084, 1096 (N.D. Ala. 2005) (summary judgment).

The Panel's "multi-dimensional decisions" standard conflicts with the analysis in *Olech* as well as the authority upon which *Olech* rested. In *Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. 441 (1923), for example, this Court allowed a claim for an equal protection violation to proceed at its initial stage, where the plaintiff plainly alleged that it had been treated differently than other property owners. *Id.* at 447. Far from involving a simple, one-dimensional set of decisions, *Sioux City* involved the question of whether both state and county authorities properly taxed a portion of a bridge that spanned two states. *Id.* at 442. The bridge in *Sioux City* not only spanned two states, but also was leased by two different railroads, was too light for modern traffic and had been improved. *Id.* Despite the unique features of the subject bridge, this Court held that the allegation that the bridge was subject to a higher tax rate than other properties (both similar and dissimilar) in the area stated a threshold claim of an equal protection violation. *Id.* at 446-47. Most importantly, this Court *assumed* discrimination, but left for another day the question of whether discrimination had actually occurred:

> It is therefore just that upon reversal we should remand the case for a further hearing upon the issue of discrimination, inviting attention to the well-established rule in the decisions of this court, cited above, that mere

> errors of judgment do not support a claim of discrimination, but that there must be something more — something which in effect amounts to an intentional violation of the essential principle of practical uniformity.

Id. at 447 (citing *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U.S. 350, 353 (1918)).

Despite the fact that the *Sioux City* case involved multiple decisions based on multiple factors, this Court applied the proper analysis in assuming the plaintiff's allegations as true and leaving for another day the determination of actual discrimination. The Panel, however, referred to this Court's opinion in *Sioux City* and its prior decision in *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336 (1989), as being " ' as far removed from the pantheon of influential equal protection cases as one could imagine.' " App. at 22a (quoting Robert C. Farrell, *Classes, Persons, Equal Protection, and Village of Willowbrook v. Olech*, 78 Wash. L. Rev. 367, 394 (2003)). The Panel distinguished the *Sioux City* opinion as involving a "single answer to a single question . . . the market value of the property." App. at 25a. However, it is clear that, despite the apparent multiplicity of factors at issue in the *Sioux City* case, this Court accepted the plaintiff's allegations of unequal treatment and delayed summary determination until after discovery.

Prior to the Panel's decision in this case, another panel of the Eleventh Circuit held that "class of one" cases may proceed past the Rule 12(b)(6) stage on the basis of "general" allegations. *Exec. 100, Inc. v. Martin County*, 922 F.2d 1536, 1541 (11th Cir. 1991), *cert. denied*, 502 U.S. 810 (1991). In *Exec. 100*, the Eleventh Circuit reversed a lower court dismissal of a "class of one" claim, holding that "the plaintiffs state an as applied equal protection claim" where "[t]he plaintiffs allege that the defendants treated them differently from other similarly situated landowners . . . without any reasonable basis." *Id.* at 1541. The Eleventh Circuit accepted the allegations of plaintiffs as true, as it was required to do, and did not engage in an analysis of the nature of the decision being challenged in that case. *Id.* at 1539.

Other circuits have similarly held that a "class of one" equal protection claim survives a motion to dismiss on the pleaded facts. *See Crowley v. McKinney*, 400 F.3d 965, 971-72 (7th Cir. 2005) (dismissal of "class of one" claim at Rule 12(b)(6) stage was premature when general allegations of similarity and impermissible motive were made in complaint); *DeMuria v. Hawkes*, 328 F.3d 704, 707 (2d Cir. 2003) (general allegations sufficient to pass Rule 12(b)(6) analysis in consideration of *Olech*). At least two circuits have specifically recognized the distinction between the pleading requirements for a motion to dismiss and for a motion for summary judgment with respect to the "similarly situated" prong of a "class of one" claim. *See TriHealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 788 (6th Cir. 2005) (distinguishing a case reversing the dismissal of a "class of one" claim because "in reviewing the district court's award of summary judgment, we are not bound by the 'decidedly liberal'

standard of review applied to a complaint challenged under Rule 12(b)(6)"). The Tenth Circuit held that:

> *Because the Supreme Court considered Olech on a motion to dismiss, it had nothing more than an allegation that the plaintiff was similarly situated to others.* Since then, appellate courts have examined *Olech* claims at the summary judgment stage, where the factual record is more thoroughly developed. In such cases, courts have insisted that plaintiffs demonstrate similarity in all material respects.

Jicarilla Apache Nation v. Rio Arriba County, 440 F.3d 1202, 1212 (10th Cir. 2006) (emphasis added).

C. Circuit Courts Are Imposing Different Standards In "Class Of One" Equal Protection Cases.

As discussed *supra*, several circuit opinions have recognized that *Olech* does not provide for a heightened pleading standard in "class of one" claims. However, one recent appellate decision raises the question of whether other circuits will also impose requirements in "class of one" claims not permitted by this Court pursuant to its decision in *Olech*.

The Sixth Circuit recently applied a constrained analysis similar to the Panel's decision when it pierced the pleadings to find that plaintiffs had failed to state a "class of one" claim where it assumed that defendants had not been treated differently than others and that a rational basis existed for the complained of action. *Ass'n of*

Cleveland Fire Fighters v. City of Cleveland, 502 F.3d 545, 550 (6th Cir. 2007). The dissent in *Cleveland Fire Fighters* highlighted the very issue presented by this petition by noting the Sixth Circuit panel's failure to adhere to *Olech*:

> In my view, however, the *Olech* decision should carry far more weight in our decision today than the majority acknowledges. . . .
>
> . . . Like Olech's complaint, the complaint here can "fairly be construed" as alleging that the City of Cleveland intentionally denied residency exemptions to [plaintiffs] though the City granted exemptions to other similarly situated employees. . . . These allegations are sufficient to state a claim for relief under *Olech*.

Id. at 554 (Moore, C.J., concurring in part and dissenting in part).

The Panel's decision, as well as the Sixth Circuit's *Cleveland Fire Fighters* decision, provides support for other circuits to ignore the plain language in *Olech* and instead impose such stringent requirements upon plaintiffs that it will be virtually impossible to assert a claim for violation of equal protection in a "class of one" case. This Court should grant review in this case to address this issue of significant importance.

D. The Panel Ignored Precedent From This Court Outlining The Pleading Standard For Cases Involving Alleged Constitutional Violations.

The Panel decision in this case, like the *Cleveland Fire Fighters* decision discussed *supra*, conflicts with the notice pleading standards applicable to a Rule 12 motion to dismiss as enunciated by this Court. Indeed, this Court's decisions have been clear that "Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). In *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), this Court held that the pleading specificity standard "does not impose a probability requirement at the pleading stage" but instead "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" supporting the claim. *Id.* at 1959. Thus, it is sufficient if the complaint "identifies facts that are suggestive enough to render [the claim] plausible." *Id.* at 1965.

This Court most recently addressed the pleadings standard in the constitutional context in *Erickson v. Pardus*, 127 S. Ct. 2197 (2007) (*per curiam*). In *Erickson*, a prisoner brought a Section 1983 claim against prison medical officials, alleging deliberate indifference to his medical needs in violation of his Eighth Amendment rights. *Id.* at 2198. The Tenth Circuit affirmed the district court's dismissal in *Erickson* based on its conclusion that the plaintiff had made "only conclusory allegations to the effect that he has suffered a cognizable independent harm. . . ." *Id.* at 2199. This Court, however, found that the plaintiff had sufficiently pleaded harm and that

"it was error for the Court of Appeals to conclude that the allegations in question . . . were too conclusory to establish for pleading purposes that petitioner had suffered 'a cognizable independent harm'. . . ." *Id.* at 2200. This Court further held:

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only " 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, *supra*, *quoting Conley v. Gibson*, 255 U.S. 41, 47 (1957). In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all factual allegations contained in the complaint.

Id.

Moreover, this Court has repeatedly held that heightened pleading and evidentiary standards are inappropriate in Section 1983 cases. In *Gomez v. Toledo*, 446 U.S. 635 (1980), this Court addressed whether, in a Section 1983 case against a public official who may be entitled to immunity, a plaintiff must plead allegations in anticipation of the affirmative defense of qualified immunity. *Id.* at 635-36. This Court first reaffirmed that:

> [t]wo and only two allegations are required in order to state a cause of action under [Section 1983]. First, the plaintiff must allege that some person has deprived him of a federal right.

> Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.

Id. at 640. The Court in *Gomez* then refused to force a plaintiff to adhere to a heightened pleadings standard to address the anticipated defense of qualified immunity. *Id.* at 641.

In *Crawford-El v. Britton*, 523 U.S. 574 (1998), this Court considered whether federal courts should apply a heightened evidentiary standard in Section 1983 unconstitutional motive cases. *Id.* at 577. The Court refused to impose such a standard and noted that "we have consistently declined similar invitations to revise established rules that are separate from the qualified immunity defense." *Id.* at 595. The Court further explained that "questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process." *Id. See also Leatherman v. Tarrant County Narcotics Intelligence Coordination Unit*, 507 U.S. 163, 168 (1993) (refusing to allow heightened pleading standard in Section 1983 civil rights action against municipality); *Hill v. McDonough*, 547 U.S. 573 (2006) (noting in connection with a Section 1983 case that "[i]mposition of a heightened pleading standard is quite a different matter. Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts.").

The Panel opinion reversed the inquiry mandated by this Court in *Erickson* and its predecessors and held that Griffin's claim should be dismissed because "[t]he complaint is filled with facts that suggest a rational basis for the defendant's [sic] actions." The novel test applied by the Panel violated well-established precedent by construing the allegations against Griffin and by imposing upon Griffin a heightened pleading standard. The Panel unjustifiably assumed that because certain allegations were not supported, Griffin would not be able to obtain evidence to support those facts.

E. The Panel's Application Of Fed. R. Civ. P. 10(c) Conflicts With Decisions From Other Circuits.

This Court has never interpreted Rule 10(c) to determine the precise treatment to be given to attachments in considering a motion to dismiss, but the appellate courts have issued various contradictory rulings on this issue.

The Eleventh Circuit has held that all facts contained in the attachments to the complaint must be considered to be true, and applying that standard, the Panel determined that Griffin had "pled too much." Most prominently, the Panel construed statements in the ALJ order as contradicting allegations in Griffin's complaint. Moreover, the Panel did not merely consider these facts to be true – the Panel considered the facts contained in the attachments to be the *only* evidence that might ever be adduced on certain points.

Other circuits have held clearly that Rule 10(c) does not require a plaintiff to adopt as true all facts in

attachments to a complaint. *See, e.g., Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 674-75 (2d Cir. 1995) (holding that it "is not a proper reading of the rule" to contend that "Rule 10(c) requires a plaintiff to adopt as true the full contents of any document attached to a complaint or adopted by reference"); *Northern Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 455-56 (7th Cir. 1998) ("When the exhibit, however, is not the subject of the claim, Rule 10(c) does not require a plaintiff to adopt every word within the exhibits as true for purposes of pleading simply because the documents were attached to the complaint to support an alleged fact.").

The reasoning of the Second and Seventh Circuits is more sound than that of the Eleventh Circuit on this point. It would be unfair to force a plaintiff to adopt as true each and every fact contained in any attachment to a complaint. In many instances, evidence developed during discovery could disprove facts contained in an attachment. For example, in a defamation case, the plaintiff plainly disavows certain statements contained in attached articles which are alleged to be defamatory. Certainly just because a statement is made in an attachment does not mean that the fact has been conclusively established and cannot be disproved by other evidence. Moreover, a plaintiff should not be punished – as Griffin was in this case – because it attached documents in an attempt to support its factual allegations in the complaint.

Regardless of the interpretation of Rule 10(c), the statements in the ALJ order support, and do not contradict, Griffin's allegations. Therefore, the order

cannot possibly be construed to "reveal facts which foreclose recovery as a matter of law." *See Associated Builders, Inc. v. Ala. Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974).

F. Griffin Properly Pled A Claim For An Equal Protection Violation.

In this case, the Panel improperly decided at the pleading stage, contrary to direct allegations in the complaint, that the government decisions at issue in this case were "multi-dimensional." The facts as alleged, however, show that the basis for Griffin's discriminatory treatment claim involved a single answer to the single question of whether conditions at Griffin's Dublin Facility posed an emergency requiring action to shut down the plant, without warning, by suspending the LAS Permit. The same standard for the maximum acceptable level of nitrates in wastewater applies uniformly to all rendering companies with LAS Permits. Yet while the EPD suspended Griffin's LAS Permit based on isolated readings of water in one on-site test well, the same action was not taken with respect to Griffin's competitor whose water readings far exceeded the legal limits for an extended duration of time. Griffin has alleged that there was no rational basis for treating the two competitors differently in determining whether the purportedly high levels of nitrates posed a threat to human health.

These specific allegations, along with the general allegations that Griffin and American Proteins were similarly situated, easily satisfy the pleading standards set forth in *Olech* and *Twombly*. The Panel decision radically departed from this Court's holdings and from

the interpretation of *Olech* by other courts to impose a summary judgment standard on Griffin's complaint in ruling on a motion to dismiss.

Nothing in the ALJ's ruling directly contradicts and forecloses proof of the allegations in the complaint. Although certain statements in certain of the attachments to Griffin's complaint could arguably support Respondents' argument that Griffin and its competitors were not similarly situated, those statements are not the only possible evidence on this point. To the contrary, other statements in the same attachments support Griffin's allegations that Griffin and its competitors are similarly situated. Moreover, Griffin can introduce substantial evidence – and would have done so prior to the summary judgment stage – supporting its contention that it is similarly situated with its competitors. The Panel improperly held not only that all statements in the attachments were true but also that certain statements constituted conclusive evidence on the point in question.

The Panel's novel "multi-dimensional decisions" test requires district courts to make a factual determination at the notice pleading stage regarding whether a decision is multi-dimensional without having the benefit of the factual record developed through discovery. This new standard runs the significant risk that the court's assumption – as it was here – will be incorrect. This novel test conflicts with the requirements set forth by the Court in *Olech* for pleading a "class of one" claim and conflicts with decisions rendered by the Eleventh Circuit and other circuits.

II. THE ELEVENTH CIRCUIT'S REQUIREMENT OF FACTUALLY SIMILAR AUTHORITY TO ESTABLISH FAIR WARNING OF AN EQUAL PROTECTION VIOLATION FOR PURPOSES OF QUALIFIED IMMUNITY CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE ELEVENTH CIRCUIT.

The Panel improperly held that *Olech* and *Executive 100* did not give Respondents "fair warning" that their actions were unconstitutional, because the Panel required the cases to be very similar factually in violation of the Supreme Court's holding in *Hope v. Pelzer*, 536 U.S. 730 (2002).

A. This Court's Opinion In *Hope* Eliminated The Requirement That Prior Case Law Must Be "Substantially Similar" In Order To Place A Defendant On Notice That His Behavior Is Unconstitutional.

The qualified immunity defense requires courts to enter judgment in favor of a government employee unless the employee's conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Saucier v. Katz*, 533 U.S. 194, 200 (2001), this Court held that lower courts' "first inquiry must be whether a constitutional right would have been violated on the facts alleged." Only if there is a constitutional violation can lower courts proceed to consider whether the official is entitled to qualified immunity. *Id.* at 201. For a right to be clearly established, "[t]he contours of the right must be

sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In light of pre-existing law, "the unlawfulness must be apparent." *Id.* at 640.

In *Hope v. Pelzer*, 536 U.S. 730 (2002), this Court rejected prior case law requiring "materially similar" authority in order to give a defendant "fair warning" that his conduct was violative of the Constitution. *Hope* involved the issue of whether punishment in the form of tying a prisoner to a hitching post violated the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* at 733. Finding no authority directly on point to provide "fair warning" under a materially similar set of facts, this Court opined that

> general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful."

Id. at 741 (quoting *Anderson*, 483 U.S. at 640). Citing this Court's previous opinion in *United States v. Lanier*, 520 U.S. 259 (1997), the Court held that "officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, we expressly rejected a requirement that previous cases be 'fundamentally similar.'" *Hope*, 536 U.S. at 741. Therefore, "the salient question" is "whether the state

of the law" at the time of violation "gave respondents fair warning that their alleged treatment . . . was unconstitutional." *Id.*

In *Hope*, this Court found that the use of a hitching post "unnecessarily and wantonly inflicted pain," and thus constituted a clear violation of the Eighth Amendment. *Id.* Indeed, this Court found the violation to be "so obvious" that the Court's own cases, albeit not factually similar, gave the respondents fair warning that their conduct was unconstitutional. *Id.*

This Court has recognized for at least 85 years that an equal protection violation occurs when government actors treat a plaintiff differently than those similarly situated without rational basis. *See Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. at 445. This fact was recognized and reaffirmed in *Olech* when this Court held specifically:

> Our cases have recognized successful equal protection claims brought by a "class of one" where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment.

Olech, 528 U.S. at 564 (citing *Sioux City*, 260 U.S. at 441; *Allegheny Pittsburgh Coal Co.*, 488 U.S. at 336).

Prior to the Panel's decision in this case, the Eleventh Circuit explicitly recognized the "class of one" equal protection claim where an individual was intentionally treated differently than others similarly

situated. In *Exec. 100, Inc. v. Martin County*, discussed *supra*, the Eleventh Circuit reversed a lower court dismissal of a "class of one" claim, holding that "the plaintiffs state an as applied equal protection claim" where "[t]he plaintiffs allege that the defendants treated them differently from other similarly situated landowners . . . without any reasonable basis." *Exec. 100*, 922 F.2d at 1541.

The Eleventh Circuit has previously acknowledged that after this Court's decision in *Hope*, it is not required to search for factually similar authority in order to find "fair warning" for purposes of qualified immunity. *See Akins v. Fulton County, Ga.*, 420 F.3d 1293, 1307 (11th Cir. 2005) ("Post-*Hope*, as instructed by the Supreme Court, we are compelled to engage in a different analysis."), *cert. denied sub nom., Gates v. Akins*, 546 U.S. 1095 (2006); *Mercado v. City of Orlando*, 407 F.3d 1152, 115 (11th Cir. 2005) ("The 'reasoning, though not the holding' of prior cases can also 'send the same message to reasonable officers' in novel factual situations.") (quoting *Hope*, 536 U.S. at 743).

Contrary to the rulings of this Court, as well as its own precedent, the Panel in this case effectively used a pre-*Hope* analysis when it held that existing "class of one" decisions could never provide a "broad principle of law" placing government actors on notice that they cannot discriminate against a plaintiff because the "precise facts of a case are critical in evaluating a 'class of one' claim." App. at 39a. The Panel's decision indicates that because its new analysis for "class of one" cases is so fact-intensive, only cases with "materially similar facts" can provide government actors "fair warning" that

their actions are unconstitutional. This holding is in direct conflict with the mandate in *Hope* that a case does not need to address "materially similar facts" to give a public official "fair warning" that his or her conduct is unconstitutional.

B. In Contrast To The Panel's Decision, The Second Circuit Has Held That Equal Protection Violations In "Class Of One" Cases Were "Clearly Established" By *Olech*.

In contrast with the Panel decision, the Second Circuit has held that the *Olech* opinion made the "class of one" equal protection violation "well established" for purposes of qualified immunity in a number of different factual circumstances.

In *Cobb v. Pozzi*, 363 F.3d 89 (2d Cir. 2004), the Second Circuit held that *Olech*-based equal protection principles were "clearly established" for purposes of qualified immunity. *Id.* at 111. The *Pozzi* court examined whether corrections department officials alleged to have retaliated against the plaintiff corrections officers because of their association with the union were entitled to qualified immunity. *Id.* at 92-93, 111. The *Pozzi* defendants argued that they were entitled to qualified immunity based on the argument that "the equal protection principles articulated in *Olech* were not clearly established law at the time of the alleged unconstitutional conduct at issue," and that they "treated the [plaintiffs] in a manner that was objectively reasonable." *Id.* at 111. Despite the fact that the conduct at issue pre-dated *Olech*, the Second Circuit nevertheless

found that the "class of one" equal protection claim was simply *reaffirmed* by *Olech*:

> We reject these arguments. First, the law pertaining to "class of one" equal protection claims was clearly established in 1999. As we recently noted . . . the Supreme Court did not depart from well settled equal protection principles in *Olech*. Rather, the *Olech* Court merely "reaffirmed" that "equal protection claims can be brought by a class of one." As the Supreme Court underscored in *Olech*, the Court has long "recognized successful equal protection claims brought by a 'class of one' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."

Pozzi, 363 F.3d at 111 (citing *Olech*, 528 U.S. at 564 ("citing cases stretching back to 1923")).

The *Pozzi* court denied qualified immunity based on the well-established principles reaffirmed in *Olech*, despite the fact that *Olech* concerned an entirely different and distinguishable factual scenario. *Id.* at 111-12. *See also Mimics, Inc. v. Village of Angel Fire*, 394 F.3d 836, 849 n.8 (10th Cir. 2005) (finding equal protection violation where plaintiff alleged that building inspector and village officials "singled [plaintiff's business] out" and "treated [plaintiff] differently" than other similarly situated business, but granting qualified immunity only because conduct pre-dated *Olech*: "In *Village of*

Willowbrook v. Olech, the Supreme Court definitively established the availability of an equal protection claim brought by a "class of one.").

Under this Court's authority, the authority of the Eleventh Circuit and other circuit courts, Respondents had "fair warning" that the Constitution is violated when a public official "intentionally treat[s] [the plaintiff] differently from others similarly situated and [] there is no rational basis for the difference in treatment." *Olech*, 528 U.S. at 564. Thus, the decisions in *Olech* and *Executive 100* gave Respondents "fair warning" that it is unconstitutional to apply the same regulations differently to similarly situated entities.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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